87-370

Supreme Court, U.S.
FILED
AUG 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1987

GORDON H. FAULKNER, CLOID SHULER, NORMAN HUNT, NORMAN G. OWENS, HAN CHUL CHOI, M.D.,

Petitioners,

vs.

LAVARITA D. MERIWETHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

ROBERT S. SPEAR
Chief Counsel

MICHAEL A. SCHOENING
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6333

Attorneys for Petitioners

Central Publishing Company, Inc., 401 North College Avenue, Indianapolis, Indiana

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit has wrongly decided the issue of the constitutional rights of transsexual inmates to estrogen therapy and choice of confinement. The decision is in conflict with the result reached on that issue by the Tenth Circuit.

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LAVARITA D. MERIWETHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Gordon H. Faulkner, Commissioner of Indiana Department of Correction, Cloid Shuler, Deputy Commissioner of Indiana Department of Correction, Norman Hunt, Director of Classification and Treatment for the Indiana Department of Correction, Norman G. Owens, Superintendent of Indiana Reformatory, Han Chul Choi, M.D. respectfully pray the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in cause number 86-1144 on June 4, 1987, which reversed and remanded this case to the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter District Court).

The Respondent, Lavarita D. Meriwether, is incarcerated in the Indiana State Prison, Michigan City, Indiana and was incarcerated at the Indiana Reformatory, Pendleton, Indiana at the time his complaint was filed in the District Court.

OPINIONS BELOW

The decision of the Seventh Circuit issued on June 4, 1987. A copy of that opinion has been included in a separately bound appendix at page A-1. The decision of the District Court issued on January 8, 1986, a copy of which may be found in the separately bound appendix at page A-18.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of this Court.

The decision of the Seventh Circuit was entered on June 4, 1987. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The due process clause of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from a reversal and remand for further proceedings by the Seventh Circuit. This cause concerns a civil rights action filed by an offender who had been confined at the Indiana Reformatory and who challenged the conditions, policies and practices at that institution.

B. Course of Proceedings

The original complaint was filed *pro se* on November 30, 1983, naming as defendants the Superintendent of the Indiana Reformatory and other prison employees and officials of the

Indiana Department of Correction. An amended complaint was filed by Meriwether's appointed counsel on May 29, 1985 against the same Defendants. Meriwether sought damages, declaratory and injunctive relief.

The Defendants filed their motion to dismiss on June 13, 1985, which was opposed by Meriwether. On January 8, 1986, the District Court dismissed the cause for failure to state a claim upon which relief could be granted. The Seventh Circuit reversed the District Court as to all claims raised in Meriwether's complaint and remanded for further proceedings.

C. Facts Material to the Consideration of the Question Presented

Meriwether is in the custody of the Indiana Department of Correction serving a thirty-five year term of imprisonment upon a conviction of murder. Meriwether is a male pre-operative transsexual who has undergone surgical augmentation of his face, breasts and hips to present a more feminine appearance. While incarcerated Meriwether has been denied estrogen.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit has Erroneously Decided a Question of the Constitutional Rights of Transsexual Inmates in a Way in Conflict with the Decision of Another Circuit Court by its Failure to Apply the Proper Analysis to an Eighth Amendment Claim.

On June 2, 1986, the United States Court of Appeals for the Tenth Circuit (hereinafter Tenth Circuit) decided the case of *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986) in which the court considered the constitutional rights of imprisoned transsexuals. In *Supre* the plaintiff sought to compel the Defendants, employees and officers of the Colorado Department of Corrections, to provide him with adequate medical care, appropriate classification and placement decisions resulting in a safe living environment and protection of his right to privacy as a

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transsexual. In short *Supre* raises the precise issues presented by Meriwether in his complaint as amended.

Supre was examined by several medical and psychological professionals. These health care professionals disagreed as to whether estrogen therapy was necessary and proper for Supre. The director of medical services for the Colorado Department of Correction determined that such treatment was inappropriate.

The Tenth Circuit determined:

> It was never established; however, that failure to treat plaintiff with estrogen would constitute deliberate indifference to a serious medical need.
>
> * * *
>
> This case, like *Estelle [v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)], does not present a situation where there is a total failure to give medical attention. At most, plaintiff might have made a case for negligence or medical malpractice, but he could not have established a constitutional violation. *Supre* at 963.

Cf. *Lamb v. Maschner*, 633 F.Supp. 351 (D. Kan. 1986) (inmate seeking transfer to women's facility, female clothing, cosmetics and hormone treatment failed to state a claim upon which relief could be granted). These decisions, *Supre* and *Lamb*, supra, are consistent with this Court's decision in the keynote medical care case, *Estelle v. Gamble*, 429 U.S. 97 (1976), in which the Court determined in order to state a claim for relief an inmate must establish prison officials were deliberately indifferent to a serious medical need.

The proper standard for review of a motion to dismiss is set out in *Conley v. Gibson*, 355 U.S. 41 (1957) as cited by the Seventh Circuit. Clearly a complaint should not be dismissed for failure to state a claim unless plaintiff could prove no set of facts establishing his claim that would support a grant of relief. The factual allegations of Plaintiff's complaint even when taken as true establish only a claim that Meriwether is being denied

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estrogen treatment. The Seventh Circuit's decision that this is sufficient to state a claim contradicts the holdings of the Tenth Circuit on the same issue.

Meriwether also complains of his conditions of confinement. First, Meriwether alleges he is unsafe in general population as he suffers constant threats of harm. Conversely, Meriwether contends placement of him in protective custody amounts to forced segregation for no wrongdoing depriving him of freedom of movement and forcing him to suffer other restrictions on his freedom.

On their face these claims are contradictory and devoid of any allegation of constitutional infringement. This Court has held that transfer of inmates from one institution to another, or within an institution, does not implicate a "liberty" interest within the meaning of the due process clause of the Fourteenth Amendment to the Constitution. *Meachum v. Fano*, 427 U.S. 219 (1976). In *Montanye v. Haymes*, 427 U.S. 236 (1976) the Court determined that transfer of an inmate to more restrictive quarters such as segregation was well within the terms of confinement usually contemplated by imprisonment. In *Lamb* the District Court of Kansas pointed out the dilemma presented by such a claim as follows:

> Plaintiff has also requested that he not be detained in administrative segregation. . . . In a prison setting, clearly plaintiff's options are limited. If plaintiff fears general population, he may request protective custody, but again, he will be segregated from the rest of general population. Plaintiff does not have a constitutional right to choose his place of confinement and prison officials may move a prisoner for any reason or no reason at all. *See, e.g., Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). *Lamb*, 633 F.Supp. 351 at (D. Kan. 1986).

Yet the Seventh Circuit stated:

> Nevertheless, it was premature for the district court to dismiss plaintiff's claim as a matter of law on the pleadings without ascertaining the actual conditions of plaintiff's

confinement and the existence of any feasible alternatives. *Meriwether v. Faulkner*, No. 86-1144 at 17.

The decision of the Seventh Circuit is contrary to the correct decision of the Tenth Circuit. Therefore, a writ of certiorari to review the decision below should issue.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

ROBERT S. SPEAR
Chief Counsel

MICHAEL A. SCHOENING
Deputy Attorney General

Attorneys for Petitioners

Appendix

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1144

LAVARITA D. MERIWETHER,

Plaintiff-Appellant,

v.

GORDON H. FAULKNER, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 83 C 1396 — **James E. Noland,** *Judge.*

ARGUED JANUARY 23, 1987 — DECIDED JUNE 4, 1987

Before CUMMINGS and POSNER, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

CUMMINGS, *Circuit Judge.* Plaintiff,[1] currently an inmate at the Indiana State Prison in Michigan City and previously at the

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[1] Plaintiff's counsel naturally refers to the transsexual plaintiff as "she" whereas defendants' counsel refers to plaintiff as "he." Because in reviewing the dismissal of plaintiff's complaint we must accept the factual allegations as true, we will herein refer to plaintiff as "she." In so doing, however, we intimate no view as to the factual merits of plaintiff's action.

Indiana State Reformatory in Pendleton,[2] brought this action under 42 U.S.C. § 1983 challenging the available medical care and the conditions of confinement in the Indiana Department of Corrections. Named as defendants are Gordon Faulkner, Commissioner of the Indiana Department of Corrections; Norman Owen, Superintendent of the Indiana Reformatory at Pendleton; Han Chul Choi, M.D., Medical Director at the Pendleton institution; and two other officials of the Indiana Department of Corrections. Pursuant to defendants' motion, the district court dismissed plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiff appeals this dismissal and we reverse.

I. *Factual Background*

In reviewing a dismissal under Rule 12(b)(6), the factual allegations contained in the plaintiff's complaint must be taken as true and must be viewed, along with all reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff. *Doe v. St. Joseph's Hospital*, 788 F.2d 411, 414 (7th Cir. 1986). The following discussion is therefore drawn directly from plaintiff's complaint.

Since May, 1982, plaintiff has been serving a thirty-five year sentence for murder. She is a pre-operative transsexual suffering from gender dysphoria, a medically recognized psychological disorder. She has been chemically (although not surgically) castrated[3] as a result of approximately nine years of estrogen therapy under the supervision of physicians and has undergone

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[2] Plaintiff was originally assigned to the Indiana State Prison in Michigan City. On February 3, 1983, she was transferred to the Indiana State Reformatory at Pendleton for reasons which are unclear on the record but which according to the district court were unrelated to this action. (Pl. App. 2). While this appeal was pending, she was transferred back to the Michigan City facility.

[3] The district court's opinion indicates that part of plaintiff's penis has been amputated but does not describe the circumstances surrounding the amputation (Pl. App. 9).

surgical augmentation of her facial structure, breasts, and hips so as to alter her body shape to resemble that of a biological female. She has feminine mannerisms, wears makeup and feminine clothing and undergarments when permitted, considers herself to be a female, and in fact has been living as a female since the age of fourteen.[4]

After being sentenced in 1982, plaintiff was transferred to the Department of Correction's Reception-Diagnostic Center for evaluation and classification. Although the medical examinations and evaluations conducted there supported a diagnosis of gender dysphoria, the consensus of the staff was to treat her as any other anatomical male. She was therefore assigned to the Indiana State Prison for commitment without a prescription or authorization for the use of hormone supplements.

Since the inception of her incarceration, plaintiff has been denied all medical treatment — chemical, psychiatric, or otherwise — for her gender dysphoria and related medical needs. The Medical Director at the Pendleton institution, Dr. Choi, has allegedly made humiliating remarks about plaintiff's need for estrogen and apparently once told her that "as long as she was in the Department of Corrections she would never receive the medication [estrogen] and that he would make sure of this." (Pl. Original *Pro Se* Complaint, Allegation I, Pl. App. 29). Plaintiff has suffered severe withdrawal symptoms as a result of the termination of estrogen therapy after nine years and has failed to receive any treatment for problems associated with silicone surgical implants.

Plaintiff has been confined in segregated "deadlock" in the protective custody units of the Indiana State Prison at Michigan City and the Pendleton Reformatory for periods of up to five and one-half months. While in the general prison population and in segregation, she alleges that she has been the victim of attempted and completed acts of violence and sexual assault.

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[4] At the time the district court rendered its decision on January 8, 1986, plaintiff was twenty-seven years old. At oral argument plaintiff's counsel related that she was briefly married to a male Marine.

In addition, she claims that she has been subjected to harassment by prison officers and has been forced to strip in front of officers and other inmates.

Appearing *pro se*, plaintiff brought this § 1983 action in November 1983. Counsel was appointed to represent plaintiff and an amended complaint was filed in May 1985. The complaint alleged violations of her rights under the First, Eighth, Ninth and Fourteenth Amendments of the Constitution and sought monetary, declaratory, and injunctive relief. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The court rejected plaintiff's claim for adequate medical care under the Eighth Amendment because it found that there was no "serious" medical need involved. It viewed the claim as a request for "elective medication" to maintain "a physical appearance and life style in order to satisfy [her] psychological belief." (Pl. App. 12, 14). The court also rejected plaintiff's conditions of confinement claim, concluding that protective custody was "a means of assuring the safe and efficient operation of a prison on a day-to-day basis." (Pl. App. 12). The court did not address plaintiff's allegations that she had been victimized by sexual assault, harassment, and invasions of privacy.

II. *Medical Care*

Plaintiff initially contends that the defendants' failure to provide any medical treatment for her gender dysphoria constitutes a violation of her right under the Eighth Amendment to adequate medical care. In reviewing the sufficiency of her claim, we apply the familiar standard set out in *Conley v. Gibson*, 355 U.S. 41, 45-46, that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

A state has an affirmative obligation under the Eighth Amendment "to provide persons in its custody with a medical

care system that meets minimal standards of adequacy." *Benson v. Cady*, 761 F.2d 335, 339 (7th Cir. 1985) (quoting *Wellman v. Faulkner*, 715 F.2d 269, 271 (7th Cir. 1983), certiorari denied, 468 U.S. 1217). However, not every claim by a prisoner alleging inadequate medical care states a constitutional violation. The Supreme Court has limited recovery under the Eighth Amendment to those cases in which a prisoner can establish "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104. Mere negligence on the part of a physician in diagnosing or treating a medical condition will not state a valid claim of medical mistreatment under the Eighth Amendment. *Id.* at 106.

In dismissing plaintiff's Eighth Amendment claim, the district court concluded that gender dysphoria was not a "serious" medical need. Noting that the complaint presented no perilous or life-threatening situations, it instead characterized plaintiff's request for estrogen therapy as "elective medication" necessary only to maintain "a physical appearance and life style in order to satisfy [her] psychological belief." (Pl. App. 12, 14). In the court's view, the denial of hormone treatment could not, as a matter of law, constitute deliberate indifference to a serious medical need.

The defendants echo the district court's analysis on appeal, describing plaintiff's claim as a request for cosmetic treatment to promote and maintain her current life style and appearance and not as one for treatment of a medical condition. This argument ignores the fact that in reviewing a motion to dismiss, a court of appeals is obligated to take the plaintiff's allegations as true. Transsexualism has been recognized as a serious psychiatric disorder. In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (7th Cir. 1984), certiorari denied, 471 U.S. 1017, this Court described transsexualism as:

> a condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite — a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This dis-

comfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia. . . . [S]*ee generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, *Psychological Considerations of Gender Reassignment Surgery*, 9 Clinics in Plastic Surgery 355, 357 (1982); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn. L. Rev. 288, 288 n.1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963, 963 n.1 (1971).[5]

[5] This definition is in accord with the one used by the district court taken from the Merck Manual of Diagnosis and Therapy 1434 (14th ed. 1982):

> A transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity. Most are men who consider themselves to have feminine gender identity and regard their genitalia and masculine features with repugnance. Their primary objective in seeking psychiatric help is not to obtain psychologic treatment but to secure surgery that will give them as close an approximation as possible to a female body. The diagnosis is made only if the disturbance has been continuous (not limited to periods of stress) for at least 2 yr, is not symptomatic of another mental disorder such as schizophrenia, and is not associated with genital ambiguity or genetic abnormality.
>
> In true male transsexuals the condition begins in early childhood with indulgence in girls' games, fantasies of being female, repugnance at the physical changes that attend puberty, and thereafter a quest for a feminine gender identity. Many transsexuals are adept at acquiring the skills that enable them to adopt a feminine gender identity. Some patients are satisfied with being given help to achieve a more feminine appearance, together with employment and an identity card that enables them to work and live in society as women. Others are not content with changing their social identity but can be helped to achieve a more stable adjustment with small doses of feminizing hormones. Many transsexuals request feminizing operations in spite of the sacrifices entailed. The decision for surgery sometimes raises grave social and ethical problems. Since some follow-up studies have provided evidence that *some* true transsexuals achieve more happy and productive lives with the aid of surgery, it is justified in carefully selected men. After surgery, the patients need assistance with movement, gesture, and voice production. Some homosexual men, usually with serious personality problems, request reallocation surgery. The results in these patients are unsatisfactory from both a medical and social viewpoint.

Transsexualism is not voluntarily assumed and is not a matter of sexual preference.[6] *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 748 n.2 (8th Cir. 1982)

Other courts have recognized transsexualism as "a very complex medical and psychological problem." *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) (quoting *Doe v. Minnesota Dep't of Public Welfare*, 257 N.W.2d 816, 819 (Minn. 1977); see also *Rush v. Parham*, 440 F. Supp. 383 (N.D. Ga. 1977), reversed on other grounds, 625 F.2d 1150 (5th Cir. 1980); *G.B. v. Lackner*, 80 Cal. App. 3d 64, 145 Cal. Rptr. 555 (1978); *J.D. v. Lackner*, 80 Cal. App. 3d 90, 145 Cal. Rptr. 570 (1978). In each of these cases the court invalidated a state policy denying medicaid benefits for transsexual or "sex reassignment" surgery. In so doing, each court expressly rejected the notion that transsexual surgery is properly characterized as cosmetic surgery, concluding instead that such surgery is medically necessary for the treatment of transsexualism. See, *e.g.*, *J.D. v. Lackner*, 80 Cal. App. 3d at 96, 145 Cal. Rptr. at 572 ("We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic.").

Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a "serious medical need" under the *Estelle* formulation. See, *e.g.*, *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 273 (7th Cir. 1983), certiorari denied, 468 U.S. 1217; *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980), certiorari denied, 450 U.S. 1041;

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[6] Transsexuals are to be distinguished from homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, *i.e.*, dress as females, for sexual arousal rather than sexual comfort. Both homosexuals and transvestites are "content with the sex into which they were born." *Ulane*, 742 F.2d at 1083 n.3; see also American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 302.30 (3d ed. 1980); Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry*, 6 J. Sex & Marital Therapy 116, 116-120 (1980).

Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). There is no reason to treat transsexualism differently than any other psychiatric disorder. Thus contrary to the district court's determination, plaintiff's complaint does state a "serious medical need."

At oral argument it became apparent that the defendants' real argument is that the plaintiff is not in fact a transsexual. However, this argument, challenging the factual allegations contained in plaintiff's complaint, may not be made on a motion to dismiss, where, as already emphasized, the plaintiff's allegations must be accepted as true. The defendants of course remain free to challenge the factual basis of plaintiff's complaint in a motion for summary judgment pursuant to Fed. R. Civ. P. 56. It is worth noting though that plaintiff's original *pro se* complaint contained the names of two physicians in California who had been treating her for gender dysphoria and supervising her estrogen therapy. (Pl. App. 28).

In addition to stating a serious medical need, the complaint contains allegations indicating that the defendants were deliberately indifferent to that need. They have failed to provide the plaintiff with any kind of medical treatment, not merely hormone therapy, for her gender dysphoria. Moreover, Dr. Choi, the Medical Director at Pendleton, allegedly ridiculed the plaintiff about her condition and told her that he would make sure that she never received estrogen treatment as long as she was incarcerated!

We therefore conclude that plaintiff has stated a valid claim under the Eighth Amendment which, if proven, would entitle her to some kind of medical treatment. It is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy which appears to be the focus of her complaint. The only two federal courts to have considered the issue have refused to recognize a constitutional right under the Eighth Amendment to estrogen therapy provided that some other treatment option is made

available. See *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kansas 1986). Both of these courts nevertheless agreed that a transsexual inmate is constitutionally entitled to some type of medical treatment.

In *Supre v. Ricketts*, the plaintiff, an inmate in the Colorado Department of Corrections, was examined by two endocrinologists and a psychiatrist. These doctors considered estrogen treatment, but ultimately advised against it, citing the dangers associated with this controversial form of therapy. Instead they prescribed testosterone replacement therapy and mental health treatment consisting of a program of counseling by psychologists and psychiatrists. Given the wide variety of options available for the treatment of the plaintiff's psychological and physical medical conditions, the Tenth Circuit refused to hold that the decision not to provide the plaintiff with estrogen violated the Eighth Amendment as long as some treatment for gender dysphoria was provided. Similarly, in *Lamb v. Maschner*, the plaintiff, an inmate at the Kansas State Penitentiary, had been evaluated by medical doctors, psychologists, psychiatrists and social workers and was undergoing some type of mental treatment. As a result of this treatment, the court held that the defendant prison officials were not constitutionally required to provide the plaintiff with pre-operative hormone treatment and a sex change operation.

The courts in *Supre* and *Lamb* both emphasized that a different result would be required in a case where there had been a total failure to provide any kind of medical attention at all. That is precisely the type of case before us. We agree with the Tenth Circuit that given the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment. But not such informed judgment has been made here. While we can and will not prescribe any overall plan of treatment, the plaintiff has stated a claim under the Eighth Amendment entitling her to some kind of medical care.

III. *Conditions of Confinement*

The complaint raises a number of issues concerning the conditions of plaintiff's confinement. The district court addressed only plaintiff's challenge to her continued confinement in administrative segregation in the protective custody units of the Indiana State Prison and the Indiana State Reformatory. Construing the claim as one arising under the Due Process Clause of the Fourteenth Amendment, the court dismissed it, viewing plaintiff's confinement in administrative segregation as "a means of assuring the safe and efficient operation of a prison on a day-to-day basis." (Pl. App. 12).

We agree with the district court that the plaintiff cannot maintain a claim under the Due Process Clause. The Supreme Court has on numerous occasions held that an inmate's treatment by prison authorities is rarely subject to judicial oversight under the Due Process Clause. In *Vitek v. Jones*, 445 U.S. 480, 493, the Court explained:

> [C]hanges in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Montanye v. Haymes*, 427 U.S., at 242.

This result is necessitated by the fact that prison officials have broad administrative and discretionary authority over the institutions they manage and that prisoners retain only a narrow range of protected liberty interests. *Hewitt v. Helms*, 459 U.S. 460, 467.

In *Hewitt v. Helms*, the Supreme Court expressly held that a prisoner has no protected liberty interest in being confined in the general prison population rather than in restrictive segregation. Applying the standard set out in *Montanye* and *Vitek*, the Court reasoned that "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contem-

plated by a prison sentence." 459 U.S. at 468. Given the broad uses of administrative segregation — "to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer" — the Court ruled that inmates should reasonably anticipate being confined in administrative segregation at some point in their incarceration. *Id.*

This Court has recently relied on the principles of *Hewitt* to reject a due process challenge to the lockdown restrictions in effect at the United States Penitentiary at Marion, Illinois, the federal maximum security prison. In *Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986), we held that even assuming the lockdown restrictions were permanent, the resulting conditions of confinement were not "qualitatively different from the punishment characteristically suffered by a convict," *id.* at 604-605 (quoting *Vitek*, 445 U.S. at 493), and hence did not implicate a protected liberty interest subject to judicial review under the Due Process Clause. Plaintiff's due process claim is indistinguishable from *Caldwell* and was therefore properly dismissed.

Rejecting the due process claim does not end our analysis of plaintiff's broad-based challenge to the conditions of her confinement. In *Caldwell* we expressly recognized that our holding did not preclude an inmate from attacking the conditions of his confinement as being violative of other substantive constitutional rights:

> In holding that the change in conditions at Marion does not implicate a protected liberty interest, we have not foreclosed a claim that specific restrictions, or the cumulative effect of restrictions, violate other substantive rights protected by the Constitution. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558. . . . The fact that the Constitution places substantive limitations on the conditions under which an inmate may be confined by the government does not mean that the state must conduct a hearing, or provide any other additional due-process protections, either before or after placing an inmate in such conditions.

790 F.2d at 605 n.22. Thus while plaintiff's prolonged confinement in administrative segregation does not constitute a violation of due process, it may constitute cruel and unusual punishment in violation of the Eighth Amendment.[7]

The Eighth Amendment prohibits punishments which involve the unnecessary and wanton infliction of pain, are grossly disproportionate to the severity of the crime for which an inmate was imprisoned, or are totally without penological

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[7] In the district court plaintiff apparently advanced an equal protection claim for wrongful classification, although this argument has been relegated to a footnote in her appellate brief. (Pl. Br. 17 n. 18). She claims that she should be provided with the opportunity to demonstrate at an evidentiary hearing that she should be classified as a female and housed in a female correctional institute. Plaintiff's equal protection claim is foreclosed by our decision in *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982), which held that a prison administrative decision may give rise to an equal protection claim only if the plaintiff can establish that "state officials had purposefully and intentionally discriminated against him." *Id.* at 1104. While complaining that the defendants' decision to classify her as a male was arbitary and irrational, plaintiff has not alleged any "design or intent to discriminate." *Id.*

Furthermore, the Supreme Court has held that an inmate has no legitimate expectation under the Due Process Clause of being assigned to a particular institution or in receiving a particular security classification. In *Meachum v. Fano*, 427 U.S. 215, 224, the Court explained:

> The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another.

See *Garza v. Miller*, 688 F.2d 480, 488 (7th Cir. 1982), certiorari denied, 459, U.S. 1150; *Shango v. Jurich*, 681 F.2d at 1098. Although the plaintiff is precluded from attacking the classification decision *per se*, she remains free to challenge the conditions of her confinement, resulting from that classification, as being violative of her constitutional rights under the Eighth Amendment. See *Montanye v. Haymes*, 427 U.S. 236, 242; *Caldwell*, 790 F.2d at 605 n. 22.

justification.[8] *Rhodes v. Chapman*, 452 U.S. 337, 346; *Caldwell v. Miller*, 790 F.2d at 600. Conditions of confinement, being "part of the penalty that criminal offenders pay for their offenses against society," fall within the ambit of the Eighth Amendment. *Whitley v. Albers*, 106 S. Ct. 1078, 1084 (quoting *Rhodes v. Chapman*, 452 U.S. at 347). The Supreme Court has provided no static "test" for determining whether the particular conditions of confinement constitute cruel and unusual punishment. Instead it has directed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101). In determining whether there has been an Eighth Amendment violation a court must focus on "the totality of the conditions of confinement." *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981), *French v. Owens*, 777 F.2d 1250, 1252 (7th Cir. 1985), certiorari denied, 107 S. Ct. 77. The Supreme Court has cautioned, however, that conditions are not unconstitutional simply because they are harsh and restrictive; such conditions are "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes*, 452 U.S. at 347.

Plaintiff complains that by being confined in administrative segregation, she is denied adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons. In *Caldwell*, we rejected a claim of cruel and unusual punishment arising out of the restrictions associated with the lockdown at the Marion Penitentiary. Among the conditions challenged by the plaintiff

[8] It is unclear from the complaint whether the plaintiff is also advancing a claim that her substantive rights under the Due Process Clause have been violated. In *Whitley v. Albers*, 106 S. Ct. 1078, 1088, the Supreme Court noted that the Eighth Amendment "serves as the primary source of substantive protection to convicted prisoners" and held that at least in the prison security context "the Due Process Clause affords [a prisoner] no greater protection than does the Cruel and Unusual Punishments Clause." We agree that in reviewing plaintiff's challenge regarding conditions of confinement the Eighth Amendment's prohibition against cruel and unusual punishment and any substantive rights afforded her under the Due Process Clause are coextensive.

in *Caldwell* were restricted exercise privileges, a ban on religious services, suspension of contact visitation, and restrictions on direct access to the law library. We held that the total effect of these conditions "neither result[ed] in an 'unquestioned and serious deprivation of basic human needs,' *Rhodes v. Chapman*, 452 U.S. 337, 348, . . . nor [did] they cause intolerable or shocking prison conditions. *Id.* 452 U.S. at 347." 790 F.2d at 601 n.16. Recognizing that the Constitution does not mandate that prisons be comfortable, we concluded that the challenged restrictions resulted in no more than inconvenience and discomfort. *Id.* at 601.

Of course our holding in *Caldwell* was influenced by the fact that Marion houses persons convicted of serious crimes and who while in prison have demonstrated a propensity to violence or escape. Such inmates cannot expect to be "free of discomfort." *Rhodes*, 452 U.S. at 349. In addition the duration of a prisoner's confinement in administrative segregation or under lockdown restrictions is certainly an important factor in evaluating whether the totality of the conditions of confinement constitute cruel and unusual punishment. Prisoners who are confined in administrative segregation for a relatively short period of time, over a number of months and even a number of years depending upon the type of inmates involved and the security risks present in the institution, cannot complain about the conditions of their confinement unless they are deprived of "the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347. In contrast, the plaintiff here has thirty years remaining to serve on her sentence.

Whether a prisoner may be subjected to the restrictive and necessarily harsh conditions of administrative segregation, not resulting from his own misconduct, for such a long period of time is a very difficult question. See *Hewitt v. Helms*, 459 U.S. at 477 n.9 (expressing concern that administrative segregation not be used as a pretext for indefinite confinement of an inmate). For example, we suggested in *Caldwell* that prolonged restriction on exercise that threatens an inmate's phys-

ical health could violate the Eighth Amendment. 790 F.2d at 600; cf. *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985) ("Where movement is denied and muscles are allowed to atrophy, the health of the individual is threatened and the state's constitutional obligation is compromised."). Similarly, while we held in *French* that prisoners confined in protective custody have no right of equal access to the same vocational, academic and rehabilitation programs as those in the general prison population, 777 F.2d at 1256, it is more troubling to extend that holding to an inmate who is required to serve a thirty-five-year sentence in segregation.

Obviously influencing whether prolonged segregation constitutes cruel and unusual punishment is the existence of feasible alternatives. We recognize that the administration of a prison is "at best an extraordinarily difficult undertaking." *Wolff v. McDonnell*, 418 U.S. 539, 566. As a general matter federal courts should be loath to inject themselves into the day-to-day administration and management of a prison. See, *e.g.*, *Hewitt v. Helms*, 459 U.S. at 470, 474; *Rhodes v. Chapman*, 452 U.S. at 351-352. Prison officials must be accorded wide-ranging deference in matters of internal order and security, see *Caldwell*, 790 F.2d at 596, and a federal court should not substitute its judgment for theirs "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." *Pell v. Procunier*, 417 U.S. 817, 827; *Block v. Rutherford*, 468 U.S. 576, 584-585. A prisoner such as the plaintiff poses particularly serious management problems for prison officials. Given her transsexual identity and unique physical characteristics, her being housed among male inmates in a general population cell would undoubtedly create, in the words of the district court, "a volatile and explosive situation." (Pl. App. 10). Under such circumstances it is unlikely that prison officials would be able to protect her from the violence, sexual assault, and harassment about which she complains.

Because of plaintiff's psychiatric and physical state, it may prove infeasible to fashion any kind of relief against the condi-

tion, namely prolonged confinement in administrative segregation, she challenges. Nevertheless, it was premature for the district court to dismiss plaintiff's claim as a matter of law on the pleadings without ascertaining the actual conditions of plaintiff's confinement and the existence of any feasible alternatives.

In addition to her claim challenging her indefinite confinement in administrative segregation, plaintiff's complaint raises several other challenges to the conditions of her confinement. Specifically plaintiff alleges that she has been the victim of frequent sexual assaults and other acts of violence. She also alleges that prison guards have repeatedly and unnecessarily required her to strip in front of inmates and other correctional officers solely so that they might view her unique physical characteristics. The district court did not mention either of these claims in dismissing plaintiff's lawsuit. In view of our disposition of the claims concerning medical care and administrative segregation the district court should consider these latter two claims in the first instance.

This Court has repeatedly recognized that the failure of prison officials to protect an inmate from assaults by other inmates may rise to the level of an Eighth Amendment violation if the officials were "deliberately indifferent" to the strong likelihood of an attack. See *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985), certiorari denied, 106 S. Ct. 1466; *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984). A mere lack of due care on the part of prison officials is insufficient to justify liability under § 1983. See *Davidson v. Cannon*, 106 S. Ct. 668. But if the assaults occurred so frequently as to be "pervasive," or if the plaintiff belonged to an "identifiable group of prisoners" for whom the risk of assault was "a serious problem of substantial dimensions," a court may infer deliberate indifference. *Walsh*, 733 F.2d at 476. The plaintiff here has alleged frequent assaults, and given that she is a transsexual housed in an all male prison, the risk of assault would appear to be sufficiently serious to require the defendants to take some minimal measures to protect her from assault, whether she is

confined in administrative segregation or the general prison population.

Plaintiff's claim that the defendants have deliberately failed to protect her from sexual assault is somewhat in conflict with her desire not to remain in administrative segregation indefinitely. As suggested above, however, placing the plaintiff in a general population cell appears to be an unacceptable and impractical solution. The complaint alleges that the assaults have continued while plaintiff has been confined in administrative segregation, and she certainly has a right under the Eighth Amendment to be protected from those assaults which occur as a result of the defendants' "deliberate indifference."

With respect to plaintiff's claim that she is regularly forced to strip before guards and other inmates, it should be noted that while a prisoner's expectation of privacy is extremely limited in light of the overriding need to maintain institutional order and security, see *Bell v. Wolfish*, 441 U.S. 520, 537, 558-560, the Supreme Court has recognized that a prisoner retains a remedy for "calculated harassment unrelated to prison needs." *Hudson v. Palmer*, 468 U.S. 517, 530. The Eighth Amendment's prohibition against cruel and unusual punishment stands as a protection from bodily searches which are maliciously motivated, unrelated to institutional security, and hence "totally without penological justification." *Rhodes v. Chapman*, 452 U.S. 337, 346; see *Hudson*, 468 U.S. at 530, *Smith v. Chrans*, 629 F. Supp. 606, 610-611 (C.D. Ill. 1986).

The district court's judgment dismissing plaintiff's complaint is reversed, and this case is remanded for further proceedings consistent with this opinion.[9]

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[9] Plaintiff also asks us on appeal to allow her to amend her complaint to correct pleading defects in her conspiracy claim under 42 U.S.C. § 1985(3) and to add a newly discovered equal protection claim based on the fact that she has recently learned that hormone supplements have been made available to other similarly situated Indiana prisoners suffering from gender dysphoria. Because we are reversing and remanding, the district court is in a better position to rule on these requests.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LAVARITA D. MERIWETHER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO.
	)	IP 83-1396-C
	)	
GORDON H. FAULKNER, *et al.*	)	
	)	
Defendants.	)	

ENTRY

Lavarita Meriwether is currently incarcerated at the Indiana State Reformatory in Pendleton, Indiana, serving a thirty-five (35) year sentence for murder. He is a twenty-seven (27) year-old self-proclaimed transsexual who is anatomically a male. Such condition is now known as gender dysphoria.

On May 18, 1982, plaintiff was transferred to the Indiana Department of Correction's Reception-Diagnostic Center (RDC) for evaluation and classification. At the RDC, plaintiff admitted to having access to female hormones (estrogen) and had been under the influence of estrogen since the age of sixteen (16). This long-term usage of estrogen has resulted in a "chemical castration" effect. Meriwether has received silicone implants and has undergone surgical augmentation of his facial structure and hips. He also has feminine mannerisms and wears makeup, feminine clothing and undergarments when permitted.

The medical opinion of the RDC supports the plaintiff's self-diagnosis of gender dysphoria. However, the consensus of the staff at the RDC was to treat Meriwether as any other anatomical male. As a result of this determination, plaintiff was

assigned to the Indiana State Prison for commitment without a prescription or authorization for use of the hormone supplements. Plaintiff was later transferred to the Indiana State Reformatory for reasons unrelated to this cause.

I. Transsexualism

Because this case is being examined under a 12(b)(6) motion to dismiss, the Court must accept Meriwether's claim that he is a transsexual.

The Merck Manual of Diagnosis and Therapy 1434 (14th ed. 1982) states that:

> A transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity. Most are men who consider themselves to have feminine gender identity and regard their genitalia and masculine features with repugnance. Their primary objective in seeking psychiatric help is not to obtain psychologic treatment but to secure surgery that will give them as close an approximation as possible to a female body. The diagnosis is made only if the disturbance has been continuous (not limited to periods of stress) for at least 2 yr, is not symptomatic of another mental disorder such as schizophrenia, and is not associated with genital ambiguity or genetic abnormality.
>
> In true male transsexuals the condition begins in early childhood with indulgence in girls' games, fantasies of being female, repugnance at the physical changes that attend puberty, and thereafter a quest for a feminine gender identity. Many transsexuals are adept at acquiring the skills that enable them to adopt a feminine gender identity. Some patients are satisfied with being given help to achieve a more feminine appearance, together with employment and an identity card that enables them to work and live in society as women. Others are not content with changing their social identity but can be helped to achieve a more stable adjustment with small doses of feminizing hormones. Many transsexuals request feminizing operations in spite of the sacrifices entailed. The decision for surgery sometimes raises grave social and ethical problems. Since some follow-up studies have pro-

vided evidence that *some* true transsexuals achieve more happy and productive lives with the aid of surgery, it is justified in carefully selected men. After surgery, the patients need assistance with movement, gesture, and voice production. Some homosexual men, usually with serious personality problems, request reallocation surgery. The results in these patients are unsatisfactory from both a medical and social viewpoint.

In *Ulane v. Eastern Airlines, Inc.*, 442 F.2d 1081, 1083 n.3 (7th Cir. 1984) the Court defined transsexualism as a

> condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite — a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia. . . . *See, generally,* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, *Psychological Considerations of Gender Reassignment Surgery,* 9 Clinics in Plastic Surgery 355, 357 (1982); Comment, The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma, 7 Conn.L. Rev. 288, 288 n.1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law,* 56 Cornell L.Rev. 963, 963 n.1 (1971).
>
> To be distinguished are homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, *i.e.*, dress as females, for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born. *See Diagnostic and Statistical Manual of Mental Disorders* § 302.30; Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry,* 6 J. of Sex & Marital Therapy 116, 116-20 (1980); Comment, 7 Conn.L.Rev., *supra,* at 292, Comment, 56 Cornell L. Rev., *supra,* at 963 n.3.

Plaintiff has yet to undertake the radical sex conversion operation. Such an operation

> for male-to-female transsexuals "involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics," such as breast development. Comment, 56 Cornell L.Rev., *supra* note 3, at 970 n. 37 (citations omitted); *see also* Jones, *Operative Treatment of the Male Transsexual*, in Transsexualism and Sex Reassignment 313, 314-16 (R. Green & J. Money eds. 1969); Stoller, *Near Miss: "Sex Change" Treatment and Its Evaluation*, in Eating, Sleeping, and Sexuality 258, 259 (M. Zales ed. 1982); Shaw *Sex-change Capital: Surgeon is Town's Top Draw*, Chicago Tribune, Aug. 14, 1984, § 5, at 1, 3, col. 3.

Ulane v. Eastern Airlines, Inc., 472 F.2d at 1083 n. 4.

II. 12(b)(6) Motion to Dismiss

In considering defendants' motion to dismiss, the relevant inquiry is whether

> in the light most favorable to [the] plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Similarly, it need not appear that plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. Nonetheless, . . . the pleader must set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist.
>
> Nor should the complaint be dismissed merely because the court doubts the plaintiff will prevail in the action. Whether plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings. The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of

> liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.

Wright & Miller, *Federal Practice and Procedure: Civil*, § 1357, pp. 601-03 (citations omitted).

After examining plaintiff's allegations under this standard, the Court GRANTS defendant's motion to dismiss for the reasons discussed herein.

III. 42 U.S.C. §§ 1985(3), 1986 Claims

Plaintiff alleges that defendants conspired to violate his civil rights under 42 U.S.C. § 1985(3) and are liable for damages for their alleged conspiracy under 42 U.S.C. § 1986. Title 42 U.S.C. § 1985(3) provides, in relevant part:

> If two or more persons in any state or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . the party so injured or deprived may have an a [*sic.*] action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to state a cause of action under 42 U.S.C. § 1985(3), a plaintiff must allege and prove invidious discrimination, *i.e.*, that the conspiracy was motivated by racial or otherwise class-based animus. *Griffin v. Breckenridge*, 403 U.S. 88, 100-102 (1971). *See also, Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 (7th Cir. 1984).

Plaintiff alleges that defendants conspired to deprive him of his civil rights. The elements necessary to allege civil conspiracy is well-settled. In *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980), the Seventh Circuit Court of Appeals outlined the nature of civil conspiracy and discussed the elements which must be established when asserting a claim for relief. The Court stated that:

A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.' " *Rotermund v. United States Steel Corp.*, 474 F.2d 1139 (8th Cir. 1973) (citation omitted). In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "[c]ircumstantial evidence may provide adequate proof of conspiracy." *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971). *See also, United States v. Varelli*, 407 F.2d 735, 741-42 (7th Cir. 1969). Absent the testimony of a coconspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist. Thus, the question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants threin." [*sic.*] *Hoffman-LaRoche, Inc.*, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." *Id.*

Id. at 620-621. This language, or portions thereof, has been cited with approval in subsequent Seventh Circuit decisions.

See, Bell v. City of Milwaukee, 746 F.2d 1205, 1255 (7th Cir. 1984); *Lenard v. Argento*, 699 F.2d 874, 822-83 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); *Tidwell v. Schweiker*, 677 F.2d 560, 569 (7th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

Meriwether's allegations have failed to allege any facts which would show that the defendants were acting in concert to commit an unlawful act or to commit a lawful act by an unlawful means. For this reason, plaintiff's claim that defendants conspired to violate his civil rights is without merit.

Title 42 U.S.C. § 1986 states that defendants are liable for their knowledge of any wrongs which are a result of any conspiracy pursuant to 42 U.S.C. § 1985. Since this Court has determined that plaintiff has failed to allege sufficient facts to state a violation of 42 U.S.C. § 1985(3), plaintiff's 42 U.S.C. § 1986 allegation is, therefore, without merit.

IV. Classification — Equal Protection Claim

Plaintiff alleges that defendants have acted in an irrational and discriminatory manner because of plaintiff's male classification. Plaintiff claims that such a classification deprives him of his right to privacy, personality, and existence in the female gender in violation of the United States Constitution. We find that the allegation is without merit.

Our courts have consistently emphasized the degree of deference to be accorded prison officials in their day-to-day administrative actions involving those inmate interests which do not rise to the level of federal protection. *Pell v. Procunier*, 417 U.S. 817 (1974); *Jackson v. Carlson*, 707 F.2d 943 (7th Cir.) *cert. denied*, 464 U.S. 861 (1983). Not every state action carrying adverse consequences for prison inmates automatically activates a due process right. Rather, the Supreme Court has expressly held that, absent some state-created expectation, inmates have no legitimate protected interest in not being accorded particular security classifications and in being transferred between or within correctional facilities. *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976).

Under Ind. Code 11-10-1-1 *et seq.* a committed offender must be evaluated based on several factors including his medical and psychological condition before being classified and assigned to a facility. Plaintiff attacks defendants' decision arguing that "defendants have indiscriminately labeled her a male despite the obvious problems certain to stem from this irrational and constitutionally impermissible classification." (Plaintiff's Response to Defendants' Motion to Dismiss at 8) In his complaint, plaintiff states that he has been labeled at various times, by various health care providers, as (1) a white male; (2) a black male; (3) a homosexual; (4) a transvestite; and (5) a transsexual. (Amended Complaint at 4)

We are not persuaded by plaintiff's argument. The Court realizes the difficulty the defendants may have had in trying to fulfill their statutory obligation of classifying the plaintiff. Just because the defendants may have given the plaintiff various classifications at various times does not itself mean that plaintiff's present classification is irrational and constitutionally impermissible. The Ninth circuit has recognized the complexities in defining the term "transsexual." *See, Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

Meriwether acknowledges that he is an anatomical male; however, he has had part of his penis amputated. Since the plaintiff has male genitalia, the Court does not deem it irrational for defendants to classify plaintiff as a male. Therefore, given the measure of deference accorded prison officials in their classification of inmates and the reluctance of federal courts to interfere except in extreme circumstances, we find that movant's equal protection claim does not warrant our intervention.

V. Conditions of Confinement

Meriwether states that he has been placed in conditions of isolation in the protective custody units of the Indiana State Prison and Indiana State Reformatory. He states that the incarceration has not been a result of any disciplinary infraction or violation of any rule or regulation of the Department of

Correction but is a result of plaintiff's transsexual identity and an attempt by the defendants *to prevent* physical harm to the plaintiff by other inmates. Plaintiff admits his unique characteristics *create a volatile and explosive situation* among male inmates.

In *Hewitt v. Helms*, 459 U.S. 460 (1983) the respondent prisoner argued that the Due Process Clause of the Fourteenth Amendment implicitly created an interest in being confined in a general population cell, rather than in the restrictive segregation quarters. In rejecting this argument, the United States Supreme Court held:

> We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell*, *supra*, [418 U.S. 539 at 566], and have concluded that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano*, *supra*, [427 U.S. 215 at 225]. As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948).
>
> * * *
>
> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative

> segregation," as used by the state authorities here, appears to be something of a catchall: *it may be used to protect the prisoner's safety,* to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. See 37 Pa. Code §§ 95.104 and 95.106 (1978) and note 1, *supra*. Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration. This conclusion finds ample support in our decisions regarding parole and good-time credits. Both these subjects involve release from institutional life altogether, which is a far more significant change in a prisoner's freedoms than that at issue here, yet in *Greenholtz* and *Wolff* we held that neither situation involved an interest independently protected by the Due Process Clause. These decisions compel an identical result here.

Hewitt v. Helms, 459 U.S. at 467-68 (emphasis added).

Whether the plaintiff's segregation in protective custody is to protect the plaintiff, or is for the benefit of the general population, the decision cannot be attacked on a theory of deprivation of a vested liberty interest. Under Indiana law, one factor which must be considered when a prisoner is classified and assigned to a facility is the "degree and kind of custodial control necessary for the protection of the public, staff, other confined persons, and the individual being considered." Ind. Code 11-10-1-3(a)(3) (1979). Plaintiff's confinement is a means of assuring the safe and efficient operation of a prison on a day-to-day basis — an action which "has traditionally been entrusted to the expertise of prison officials." *Id.* at 470, citing *Meachum v. Fano*, 427 U.S. 225. There is no due process claim herein.

VI. Estrogen Treatment

A more difficult problem is raised by plaintiff's request for estrogen injections. Neither the United States Supreme Court or the Seventh Circut Court of Appeals has previously addressed the issue. The issue which plaintiff presents before

this Court may be stated as follows: "Does a state prisoner, who voluntarily received hormone injections before he became incarcerated, have a constitutional right under the Eighth and Fourteenth Amendments to require a state penal institution to continue a hormone injection during the prsioner's period of incarceration?" This is a question of "elective medication."

A claim of denial of adequate medical care will be dismissed if it does not allege such a denial as to constitute cruel and usual punishment. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain prescribed [*sic.*] by an Eighth Amendment." The Court further stated:

> In order to state a cognizable claim a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.

Estelle v. Gamble, 429 U.S. at 106.

The *Estelle* standard applies to prison doctors' indifference to medical needs as well as prison guards' intentional denial or delay in medical care. *See*, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

Plaintiff claims that he has not been provided female hormones in a dosage and manner which would maintain plaintiff in the physiological status which existed when he became incarcerated. He also claims that defendants have not provided adequate health care, including psychotherapy, for treatment of his gender dysphoria. (Amended Complaint at 5) The only complaint he has about the medical treatment he is receiving is defendants refusal to provide him hormone treatments and the withdrawal symptoms which he is suffering as a result of the lack of hormones. Withdrawal symptoms themselves do not violate a prisoner's Eighth Amendment rights. *See*, *Fredericks v. Huggins*, 711 F.2d 31 (4th Cir. 1983).

Although the facts of *Fredericks* considered the withdrawal symptoms of heroin addicts, we feel that the decision is applicable to this case. Yielding that *Fredericks* is distinguishable in that the plaintiffs in *Fredericks* were suffering withdrawal from an illegal drug and, therefore, are less entitled to be provided medical treatment than an individual who is suffering withdrawal from a legal drug, the fact remains that both plaintiffs were suffering from the medical problem of withdrawal. Neither the plaintiffs in *Fredericks*, nor Meriwether have the required medical needs to meet the Supreme Court's standard for cruel and unusual punishment. *Estelle* requires a deliberate indifference to an individual's *serious* medical needs. Although we recognize that plaintiff may have a medical need, this need is not the serious need which is required. Keeping a prisoner in the same psychological condition as he was before he arrived in prison through the use of hormone injections is not what the Constitution requires. The medical treatment which plaintiff requests is not comparable to a request for insulin to treat diabetes or for a dialysis machine to treat kidney disease. Meriwether's request is essentially a request for treatment to maintain a physical appearance and life style in order to satisfy his psychological belief. This request does not establish a perilous or life-threatening situation. Because plaintiff does not allege the denial of any medical treatment other than hormone injections, we hold that the denial of hormone injections do not by themselves constitute a deliberate indifference to a serious medical need.

The Court stated in *Fredericks* that a sheriff's refusal to permit pre-trial detainees access to methadone detoxification and thus forcing detainees to undergo "cold turkey" withdrawal from heroin addiction was not unconstitutional punishment, given that sheriff's action was not punitive, but, instead, made in context of security concerns relative to exposure of inmates to drugs, even on a controlled basis, and, furthermore, the jail had well-developed procedure for handling inmates with a drug withdrawal problem which included consistent and careful observation by medical staff and charting of detainees'

medical condition throughout withdrawal periods. *Fredericks v. Huggins*, 711 F.2d at 33-34.

VII. Conclusion

The Court would like to thank plaintiff's counsel, Mr. Gary Price of Indianapolis, Indiana, for his excellent and zealous advocacy in representing his client in this case. The time and personal expense which he has incurred in this case establishes a standard of conduct which all attorneys should try to achieve. This Court is extremely grateful for all of Mr. Price's efforts. However, the Court concludes that defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be and is hereby GRANTED and the case DISMISSED for failure to state a claim upon which relief can be granted.

Dated this 8th day of January, 1986.

/s/ JAMES E. NOLAND

JAMES E. NOLAND, Chief Judge
United States District Court
Southern District of Indiana

Copies:

Gary Price, Esquire
LEWIS, KAPPES, FULLER & EADS
1210 One American Square
P.O. Box 85023
Indianapolis, Indiana 46282

Honorable Linley E. Pearson
Attorney General of Indiana
Attn: Michael B. Murphy, D.A.G.
219 State House
Indianapolis, Indiana 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LAVARITA MERIWETHER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 83-1396-C
	)	
GORDON H. FAULKNER, et al.,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

Plaintiff, Lavarita Meriwether, by counsel, for her Amended Complaint against defendants alleges as follows:

JURISDICTION

1. This action seeks damages and equitable, declaratory and injunctive relief for past and continuing violations by the defendants of Title 42 U.S.C., Sections 1983, 1985 (3) and 1986, and the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and reasonable attorney's fees pursuant to Title 42 U.S.C., Section 1988.

2. This Court has jurisdiction over the action stated herein pursuant to Title 28 U.S.C., Sections 1331, 1343, 2201 and 2202.

THE PARTIES

Plaintiff

3. Plaintiff Lavarita DeShaun Meriwether, a person, is a prisoner incarcerated in the Indiana Reformatory at Pendleton, Indiana. She is a citizen of the United States and resident of Indiana.

4. Plaintiff is a transsexual who has undergone chemical castration, and has further altered her body chemistry and physiology through the use of estrogen therapy for approximately nine (9) years. Plaintiff has undergone surgical augmentation of her facial structure, breasts, and hips. All such surgical augmentation was designed, intended and did enhance plaintiff's feminine characteristics, alter her body shape to reflect female anatomy, and otherwise altered her anatomy and physiology to accord with that found in a biological female. Plaintiff has feminine mannerisms, and when permitted, wears makeup, feminine clothing and undergarments, considers herself to be a female, desires to live as a female, and in fact, has been living as a female since the approximate age of fourteen (14) years.

Defendants

5. Defendant Gordon H. Faulkner is Commissioner of the Department of Correction of the State of Indiana and is being sued in his capacity of Commissioner of Correction of the State of Indiana.

6. Defendant Norman G. Owen is Superintendent of the Indiana Reformatory at Pendleton, Indiana, a facility of the Department of Correction of the State of Indiana, and is being sued in his capacity as Superintendent of the Reformatory.

7. Defendant Cloid L. Shuler is the Executive Director of the Adult Authority of the Department of Correction of the State of Indiana, and is being sued in his capacity as Executive Director of the Adult Authority.

8. Defendant Norman Hunt is Director of Classification of the Department of Correction of the State of Indiana, and is being sued in his capacity as the Director of Classification.

9. Han Chul Choi, is the Medical Director of Medical Services at the Indiana Reformatory at Pendleton, Indiana, and is being sued in his capacity as Medical Director of that facility.

10. The terms "defendant" and "defendants", as used

herein, include the agents, servants, employees and any other persons under the supervision or control of the named defendants. The term "defendants" refers both jointly and severally to the named defendants. At the times, places, and occurrences described herein, defendants were employed or otherwise acting pursuant to their official capacity, and title as described herein.

11. The defendants, and their agents, individually and collectively, are responsible for the administration and supervision of inmates incarcerated in all Indiana prisons and correctional facilities, including the Pendleton Reformatory, and acted intentionally and deliberately in the performance of their duties.

FACTUAL ALLEGATIONS

12. Since arrival at the Reception and Diagnostic Center (RDC) of the Department of Correction of the State of Indiana, located in Plainfield, Indiana, plaintiff has been examined by various health care providers employed by defendants. As a result of these evaluations and examinations, plaintiff has been labled, at various times, by various health care providers, as follows:

a. A white male;
b. A black male;
c. A homosexual;
d. A transvestite, and;
e. A transsexual.

13. Examinations and evaluations of plaintiff conducted before her commitment to the Indiana Department of Correction were provided to officials of the Department of Correction at RDC. These evaluations, in conjunction with the great weight of evaluations undertaken by the Department of Correction itself, indicate and yield the single conclusion that plaintiff is a "transsexual".

14. "Transsexual identity" (gender dysphoria) is a psychiatric disorder recognized by the medical profession in which an

individual evinces a persistent sense of discomfort and inappropriateness about his or her anatomic sex and a persistent wish to be rid of his or her genitals and to live as a member of the other sex.

15. Psychotherapy, chemotherapy, and surgical sexual reassignment are ordinary, necessary and accepted methods of treatment of gender dysphoria within the relevant medical community.

16. Defendants have refused to provide female hormones in a dosage and manner which would maintain plaintiff in the physiological status and condition as presented by plaintiff upon commitment and incarceration within the Department of Correction of the State of Indiana.

17. Defendants have not provided adequate health care services, including psychotherapy, for the treatment of plaintiff's gender dysphoria and related medical needs.

18. Plaintiff has been forced to undergo and be incarcerated in conditions of isolation from other inmates in "deadlock" in the protective custody units of the Indiana State Prison at Michigan City, Indiana, and the Indiana Reformatory at Pendleton, Indiana. Incarceration under conditions of isolation has not been the result of a disciplinary infraction or other violation of any rule or regulation of the Department of Correction, but has been, rather, a response to plaintiff's gender dysphoria and transsexual identity, and an attempt by defendants to prevent serious physical harm to plaintiff by other inmates.

19. Plaintiff continues to live in constant fear of imminent serious bodily injury or death, even under conditions of isolation of "deadlock", since her feminine mannerisms and unique anatomical and physiological characteristics create a volatile and explosive situation among male inmates.

20. Plaintiff has been the victim of attempted and completed acts of violence and sexual assaults and has been provoked to react in various ways for her own protection.

21. Plaintiff has suffered and continues to suffer from

depression, physical and medical problems relating to the withdrawal of hormone treatment, and a lack of adequate care and treatment for problems associated with silicone surgical implants.

22. Plaintiff has undergone and continues to undergo constant and unwarranted harrassment, disparate treatment and intentional mistreatment by defendants, and their representatives, who neither understand the medical and psychiatric components of a transsexual identity, nor have the training, supervision, or control necessary to implement and maintain humane conditions of confinement for a transsexual incarcerated within the Department of Correction of the State of Indiana.

23. Plaintiff has been denied her rights and privileges to adequate recreation, association, living space, education and occupational rehabilitation, and privacy.

THE CLAIM

24. The circumstances and conditions in which plaintiff is presently incarcerated, as set forth in the above paragraphs, constitute a denial by the defendants of plaintiff's rights under the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, including, but not limited to, the Due Process and Equal Protection Clauses, and the provisions prohibiting cruel and unusual punishment and granting a basic right to privacy.

25. Defendants' improper supervision and control over the delivery of health care services to plaintiff constitutes deliberate indifference to her serious medical needs and violates the United States Constitution, entitling plaintiff to the relief requested herein.

26. Defendants have failed to provide a reasonably safe environment for plaintiff in violation of her rights under the United States Constitution, as partially set forth above, entitling plaintiff to the relief requested herein.

27. Defendants have acted in an irrational, arbitrary or discriminatory manner in exercising the classification, evaluation and placement decisions pertaining to plaintiff and further deprived her of rights to privacy, personality and existence in the female gender in violation of the United States Constitution, including those provisions set forth above, entitling plaintiff to the relief sought herein.

WHEREFORE, plaintiff prays as follows:

1. That the Court declare the acts of the defendants, as herein alleged, are unlawful and in violation of Title 42 United States Code, Sections 1983, 1985(3) and 1986, as well as the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and Title 20 United States Code, Section 1681; and

2. That the Court permanently enjoin the defendants, their agents and employees and all persons in active concert or participation with them, from maintaining policies, practices, and procedures that deny the right of equal protection and access to equal protection to plaintiff herein; and

3. That the Court declare that the defendants have failed to provide adequate medical care and treatment in violation of her rights under the United States Constitution;

4. That the Court declare that defendants' failure to provide a reasonably safe environment for plaintiff violates her rights under the United States Constitution;

5. That the Court declare that defendants' irrational, arbitrary and discriminatory classification in placement decisions pertaining to plaintiff violate her rights under the United States Constitution, including the rights to privacy, personality and existence in the female gender;

6. That the Court enter a permanent injunction requiring defendants to provide:

(a) Adequate health care services for plaintiff's serious medical needs;

(b) A reasonably safe living environment, and;

(c) Appropriate classification and placement decisions as well as adequate protections to plaintiff's rights to privacy, personality and existence as a transsexual in the female gender;

7. That the Court enter a permanent injunction prohibiting the defendants from further indifference, interference or violation of plaintiff's rights guaranteed under the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution;

8. That defendants be ordered to pay costs, expenses and attorney's fees for this action, as authorized by the Civil Rights Act, Title 42 United States Code, Section 1988, and any other provision of law, and;

9. That the Court grant to plaintiff such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,
LEWIS KAPPES FULLER & EADS

By: /s/ Gary P. Price
Gary P. Price

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon Michael Murphy, Deputy Attorney General, 219 State House, Indianapolis, Indiana 46204, by United States mail this 17th day of May, 1985.

/s/ Gary P. Price
Gary P. Price

LEWIS KAPPES FULLER & EADS
One American Square
Suite 1210
P.O. Box 82053
Indianapolis, Indiana 46282-0003
(317) 639-1210

FORM TO BE USED BY PERSONS IN FILING A COMPLAINT PRO-SE UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. 1983

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
Indianapolis Division

Lavarita De,Shaun Meriwether

(Enter here the full name of the plaintiff or plaintiffs in this action).

-VS-

COMPLAINT
NO.
LP83-1396-C

Gordon H. Faulkner

Cloid L. Shuler

Norman Hunt

Norman G. Owens

Han Chul Choi

(Enter here the full name of the defendant or defendants in this action).

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES ( ) NO (X)

B. If your answer to (a.) is "yes," describe the action in the spaces below. (If there is more than one action describe the additional actions on the reverse side of this page).

1. Parties to the action: N/A

2. Court (if federal court, name the district; if state court, name the county: N/A

3. Docket number: N/A

4. Name of the judge who heard the case: N/A

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending): N/A

If you are imprisoned in a state penal institution then answer: C, 1, 2 & 3.

C. 1. Did you present this complaint in the state prison grievance procedure?

YES (X) NO ( )

2. If your answer is "yes," what was the result? Because of my sexual preference and sexual idetity, my custody status would remain immobility. And at that time the Superintendent Could'nt deal with me.

3. If your answer is "no", please explain: N/A

PARTIES:

D. (Place your full name in the first blank in paragraph 1., in the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The Plaintiff is: Lavarita De,Shaun. Meriwether

2. Plaintiff's address is: Post Office Box, 30-#24493-24-2J. Pendleton, Indiana. 46064

CAUSE OF ACTION:

E. I allege that the following of my constitutional rights, privileges, or immunities have been violated:

Allegation 1: (see attached complaint)

Allegation 2: (see attached complaint)

Allegation 3: (see attached complaint)

F. The following facts form the basis for the allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words — but do not make legal arguments or citations).

Allegation 1: (see attached complaint)

Allegation 2: (see attached complaint)

Allegation 3: (see attached complaint)

If you need more space to explain any allegation or to list additional facts, use the other side of this sheet or attach an additional sheet.

REQUEST FOR RELIEF:

G. 1. I, Lavarita DeShaun, Meriwether, and _____, do request that I be allowed to commence this action without pre-payment of fees and costs, or security thereof, pursuant to 28 U.S.C. 1915. The attached affidavit of indigency has been completed and is submitted in support of this request for leave to proceed in forma pauperis.

2. I believe that I am entitled to the following relief:

(see attached complaint)

/s/ Lavarita D. Meriwether

Lavarita De,Shaun. Meriwether

PLAINTIFF(S), PRO-SE

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
Indianapolis Division

Ms. Lavarita De,Shaun. Meriwether,

Plaintiff(s),

-VS-

Gordon H. Faulkner Individually, and In His Official Capacity as Commissioner of Correction's at the Indiana State Reformatory, Pendleton, Indiana,

Colid L. Shuler Individually, and In His Official Capacity as Executive Director of Adult Authority at the Indiana State Reformatory, Pendleton, Indiana,

Norman Hunt Individually, and In His Official Capacity as Director of Adult Classification at the Indiana State Reformatory, Pendleton, Indiana,

Norman G. Owens Individually, and In His Official Capacity as Superintendent at the Indiana State Reformatory, Pendleton, Indiana,

Han Chul Choi Individually, and In His Official Capacity as Medical Doctor at the Indiana State Reformatory, Pendleton, Indiana,

Defendant(s),

COMPLAINT
NO. _____

I
PRELIMINARY STATEMENT

1.) This is an action for declaratory judgment and injunctive relief brought by the named Plaintiff(s) is (are) prisoner(s) in the Indiana State Reformatory on behalf of himself (themself) to redress for the deprivations under Color of law, of the Plaintiff's (Plaintiffs') Rights guaranteed by the Constitution of the United States, *inter alia:*

a.) Plaintiff's (Plaintiffs') Right(s), guaranteed by the Eighth Amendment;

b.) Plaintiff's (Plaintiffs') Right(s) guaranteed by the Fourteenth Amendment;

c.) Plaintiff's (Plaintiffs') Right(s) guaranteed by the _____ Amendment.

II
JURISDICTION

2.) Jurisdiction is conferred upon this Court by 28 U.S.C. 1343 (3) and (4), which provides exclusive jurisdiction in cases seeking redress for the infringements of Civil Rights:

a.) Plaintiff's (Plaintiffs') action is authorized by 42 U.S.C. 1983;

b). Plaintiff's (Plaintiffs') request for declaratory relief is authorized by 28 U.S.C. 2201; 2202 and Rule 57, of the Federal Rules of Civil Procedures.

III
PLAINTIFF(S)

3.) Ms. Lavarita De,Shaun. Meriwether and _____ is (are) Inmate(s) incarcerated at the Indiana State Reformatory serving state imposed sentence(s); Plaintiff(s) is (are) a citizen (citizens) of the United States and is (are) a resident (residents) of the State(s) of Indiana. and _____.

IV
DEFENDANT(S)

4.) Norman G. Owens has the official capacity as Superintendent of the Indiana Reformatory, is individually responsible by official nonfeasance, malfeasance and/or misfeasance of office deprived Plaintiff's (Plaintiffs') constitutional right(s) under Color of law, and was working in said official capacity on the day(s) and event(s) in question.

a.) Cloid L. Shuler has the official capacity as Executive Director of Adult Authority, is individually responsible by official nonfeasance, malfeasance and/or misfeasance of office deprived Plaintiff's (Plaintiffs') constitutional right(s) under Color of law, and was working in said official capacity on the day(s) and event(s) in question.

b). Doctor Norman Hunt has the official capacity as Director of Classification, is individually responsible by official nonfeasance, malfeasance and/or misfeasance of office deprived Plaintiff's (Plaintiffs') constitutional right(s) under Color of law, and was working in said official capacity on the day(s) and event(s) in question.

c). Gordon H. Faulkner has the official capacity as Commissioner of the Department of Correction of Indiana, is individually responsible by official nonfeasance, malfeasance and/or misfeasance of office deprived Plaintiff's (Plaintiffs') constitutional right(s) under Color of law, and was working in said official capacity on the day(s) and event(s) in question.

d). Doctor Han Chul Choi has the official capacity as Head Medical Doctor/Indiana State Reformatory, is individually responsible by official nonfeasance, malfeasance and/or misfeasance of office deprived Plaintiff's (Plaintiffs') constitutional right(s) under Color of law, and was working in said official capacity on the day(s) and event(s) in question.

V
STATEMENT OF FACTS

5). See Attached Allegation Hereto.

VI
FIRST CLAIM

6.) The Defendant(s) of this complaint by nonfeasance, malfeasance and/or misfeasance violated Plaintiff's (Plaintiffs') EIGHTH Amendment Right of the United States Constitution under Color of law by such actions which are enumerated below:

a.) The Defendant's [*sic.*] in question has [*sic.*] blatantly subjected the Plaintiff to cruel and unusual punishment by restraining the plaintiff on a Protective Custody Self-Lockup Unit against her will, and not acknowledging the medical needs of the Plaintiff.

b.) The Defendants have denied the Plaintiff medical treatment in which the plaintiff needs such to treat Gender Dysphoria. Present medical research indicates that the medication is administered at a critical period in the process of gender differentiation, and it appears that once this process commences it is irreversible. This process and medical need has been with the Plaintiff since the age of Fourteen (14). Such wilful denial of medical care and deliberate indifference on the part of prison authorities against the plaintiff has denied the plaintiff her Eighth Amendment rights.

c.) That the Defendant's [*sic.*] have set rules and irregular guidlines for the plaintiff's personal conduct that should only be applied to disciplinary problem inmates and not for an inmate who's only problem is sexual identity and adaptation.

d.) That the Defendant's [*sic.*] herein have constantly harrassed the Plaintiff because of her sexual identity, directly and indirectly, to the point where such actions clearly constitute cruel and unusual punishment.

See Attached Allegations for further Explanations.

VII
SECOND CLAIM

7). The Defendant(s) of this complaint by nonfeasance, malfeasance and/or misfeasance violated Plaintiff's (Plaintiffs') Fourteenth Amendment Right to the United States Constitution under Color of law by such actions which are enumerated below:

a.) The Defendants have discriminated against the Plaintiff because of her sexual identity as that of a pre-operative transsexual in classifying the plaintiff as a man and placing the plaintiff in a [*sic.*] all male institution.

b). That the Defendant's [*sic.*] have denied the plaintiff equal protection by ignoring plaintiff's sexual identity and medical needs in their classification and proper placement of her.

c.) That the Defendants have repeatedly restrained the plaintiff's liberty within the Department of Correction by placing the plaintiff on a Protective Custody Self-lockup Unit against her will because of her sexual identity and their inability to meet the needs of a transsexual.

d.) That Plaintiff was tried, convicted, and sentenced as a female by the State of Indiana but placed in a male institution, denied equal protection of the law, discriminated against, and restrained of her liberty once placed in a male institutional Lock-up Unit, denied medical treatment, and then harrassed because of her sexual identity, all in violation of the due process clause of the Fourteenth Amendment and the Equal Protection clause.

See attached Allegation for further information.

VIII
THIRD CLAIM

8.) The Defendant(s) of this complaint by nonfeasance, malfeasance and/or misfeasance violated Plaintiff's (Plaintiffs') _____ Amendment Right to the United States Constitution under Color of law by such actions which are enumerated below:

a.)

b.)

c.)

d.)

ALLEGATION 1

Upon arrival at the Diagnostic - Center, Plainfield, Indiana, for placement in the Department of Correction on May 18, 1982, I explained to several doctor's there that I was in need of my medication (Estrogen) to which I have been taking for nine (9) years, including while incarcerated in the Clark County Jail for the instant offense. I also gave these doctors the names of the two doctor's, Dr. Francis White, 233 A Street, Fifth floor, San Diego, California, and Dr. A Ury, 511 Highland Ave. National City, California, who were treating me in the past for the transformation of my sex from male to female. I also gave these doctors at the Diagnostic — Center the name of the doctor who was continuing my treatment for my transformation with Estrogen while I was incarcerated at the Clark County Jail. However, upon arrival at the Indiana State Prison, Michigan City, Indiana, I was questioned by several doctors about the medication that I was suppose to receive as stated by the doctors at the Diagnostic Center, then they explained to me that they never received word to the effect that once I arrived at the Indiana Prison I was to receive the medication known as Estrogen.

The plaintiff herein transfered to the Indiana Reformatory, Pendleton, Indiana, on February 3, 1983, where she is presently incarcerated. The plaintiff requested an interview with the head acting doctor at the Indiana Reformatory and was told that his name is Dr. Han C. Choi, and was granted this request. Two weeks later the plaintiff herein explained to Dr. Han C. Choi that she was not a Homosexual but a Transexual [*sic.*] and that there is a great difference between the two terminologies, and that the medication that the plaintiff was requesting was for a Gender Dysphoria and by the plaintiff being an [*sic.*] pre-operative transsexual the need for the medication was not just for personal satisfaction, but also for medical reasons. Dr. Han C. Choi explained to me that because I was in a Male institution that the need for such medication is non-existant. Also Dr. Choi took what the plaintiff said as a joke rather than a serious medical statement, he made humiliating jokes about the medication and told the plaintiff that as long as she was in the Department of Correction she would never receive the medication and that he would make sure of this. Therefore, the Plaintiff contends that she was denied medical treatment in violation of the Eighth Amendment of the United States Constitution.

ALLEGATION 2

Throughout the time the plaintiff has been within the jurisdiction of the Department of Correction of Indiana there has been unjustified harrassment by the officials and staff members. When the plaintiff arrived at the Indiana Reformatory she was placed immediately on the Protective Custody Unit against her will because of her sexual identity and the institutions inability to meet the situation effectively. While on this lock-up unit, the plaintiff was subjected to unjustified harrassment by the officers and was forced to strip in front of the officers and other inmates to expose her breast and private parts. The plaintiff was forced to remain on the self-lockup unit for five (5) months against the plaintiffs will and when taken off this unit was made to sign a Contractual Agreement stating that the plaintiff would not wear any female clothing or facial

make-up while in population and if caught doing so they would place the plaintiff back on the self-lockup unit for the duration of her thirty-five year sentence. When the plaintiff was allowed to go to the gymnasium she was not allowed to dress as other inmate [*sic.*] because of the revealing characteristics of the plaintiff's body, but yet the officers who were in charge repeatedly told the plaintiff to dress as other male inmate. With this conflict of commands, the plaintiff was given conduct reports for wearing cloths that were not to be worn outside the cell house area, yet other inmates were allowed to wear the same type of clothing as the plaintiff was wearing.

During shower time in the gymnasium the officers would stand and watch the plaintiff taking a shower and would not move from their position until the plaintiff was fully dressed. This procedure is not utilized for other inmates yet they employ it for the plaintiff when ever [*sic.*] it was time to take a shower. The plaintiff wrote the Superintendent, Norman G. Owens, about these matters contained herein, but to no avail. The plaintiff was told by Superintendent Owens that she was to be treated as the other male inmates and that there would be no display of treatment different from the rest, however, the plaintiff was and is still being treated differently from other inmates. I was told that if their were any problems with the staff to advise him, Norman G. Owens, I did, but the problems continued to exist then and now.

This endless problem of the plaintiff's adjustment to a male institution and the problem of this institution when dealing with a transsexual is and will become a bigger problem if nothing is done to eliminate the cruel and unusual punishment being inflicted upon the plaintiff. The plaintiff states that she has a term of thirty-five (35) year [*sic.*] to serve pursuant to her conviction in the Clark County Circuit Court and to go on with this type of treatment is cruel and unusual punishment regardless of one's sex. The unhumane [*sic.*] treatment of the plaintiff by the Department of Correction staff should not be inflicted on any man or woman regardless of a person's crime and sentence that he/she has to serve and the existance of such

should be stopped because it violates the Eighth amendment to the United States Constitution.

ALLEGATION 3

I was sentenced by the Circuit Court of Clark County, State of Indiana, under Cause No. 81-CR-41, to a term of Thirty-five years, and as a Female. Such sentencing, in pertinent part, is as follows:

-7-

Q 10 Alright, and do you understand that alright?

A Yes sir I do.

Q 11 Is there any question in your mind concerning it?

A No sir.

Q 12 Okay. Lavarita I want to go into this aspect concerning you because we are on a, what we say in this Court room and with regard to this matter is on the record and I want the persons who may read this report in the future to understand what we are doing here today. Now according to the psychiatric report you are actually a male, were born a male person, is that correct?

A Yes sir it is.

Q 13 And you are in the process at this time of undergoing a transformation with regard to your sexuality, is that correct?

A Yes sir it is.

Q 14 Now do you prefer to be referred to as a male or as a female?

A As a female.

Q 15 And during the course of this hearing do you want me to refer to you as her or she in the feminine gender?

A Yes sir.

Q 16 Alright, I'll do that. Now your name that you have is Lavarita Meriweather, is that correct?

A Yes sir it is.

Questions were asked throughout the trial and prior thereto whether the prosecuting attorney, Mr. Daniel Donahue, was going to have the defendant, the plaintiff herein, tried as a Female. The prosecution stated, through the media, that he was in fact going to have me tried as a Female, since in fact, I was more Female than Male according to the psychiatric evaluations performed before trial by the Mental Health Department of Jefferson, Indiana. Such report stated that the plaintiff appeared female and should be considered female. All court docket entries and other legal documents were entitled to reflect a female defendant being tried in the case

Upon sentencing, the Honorable Judge Clifford H. Maschmeyer sentenced the plaintiff herein as Ms. Lavarita DeShaun Meriwether and not Mr. Lavarita DeShaun Meriwether. The general purpose for the psychiatric report was to advise the court and the Department of Correction of the plaintiff's sexual identity as that of a female and to effectuate proper placement within the Department of Correction if need be. However, as of this date, the Department of Corrections has not seriously considered the contents of the report nor have they considered placing the plaintiff in the proper institution for females and not men. Because of my improper placement in a male institution, I have been subjected to cruel and unusual punishment, mental anguish, and discrimination because of my established sexual identity as that of a female.

IX
EQUITY

9.) Plaintiff(s) has (have) suffered irreparable mental harm and anguish due to the actions of the Defendant(s) heretofore mentioned in the complete denial of Plaintiff(s) constitutional right(s). There is no adequate remedy at law to redress Plaintiff(s) of the unlawful actions of the Defendant(s) other than

this which is presently before this court seeking redress, Plaintiff(s) will continue to suffer until he (they) is (are) granted the relief sought herein.

X
PRAYER FOR RELIEF

10.) WHEREFORE, Plaintiff(s) respectfully request that this Honorable Court enter judgment granting:

a.) Declaratory judgment that Defendant(s) acts, non-acts, policies, practices, and procedures herein described and complained of violated Plaintiff(s) Eighth and Fourteenth Amendment Right(s) of the United States Constitution;

b.) Plaintiff respectfully requests that the Defendants be held accountable for $250,000.00 punitive damages for the mental, emotion and physical suffering inflicted upon the plaintiff because of the negligence and wilful indifference displayed by the Defendantd [*sic.*] herein.

c.) Plaintiff respectfully requests that Defendants be Ordered to remedy the constant cruel and unusual punishment being placed upon the plaintiff by her incarceration in a male institution.

d.) The Plaintiff respectfully request [*sic.*] that the Department of Correction be Ordered to establish some means of continuing Plaintiff's medical treatment, or in the alternative, place Plaintiff in an institution which provides such medi-treatment, [*sic.*] in state or out-of-state.

e.) Plaintiff respectfully request [*sic.*] that the Court define and submit guidlines [*sic.*] for the placement and treatment of preoperative transsexuals within the Depart-

ment of Correction so that the Defendants may, in the future, have the mental ability and facilities available to meet the guidlines [*sic.*] set.

f.)

Respectfully submitted

/s/ Lavarita D. Meriwether
(Name)

24493
(D.O.C. No.)

_____
(Name)

_____
(D.O.C. No.)
Post Office Box 30
Pendleton, In. 46064

PLAINTIFF(S), PRO-SE

AFFIDAVIT

Before the undersigned Notary Public a resident of Delaware County, Daleville, Indiana, for the County of Madison and Lavarita D. Meriwether, Plaintiff in the within action who, being first duly sworn according to law deposes and says: That the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

Respectfully,

/s/ Lavarita Meriwether

PLAINTIFF(S), PRO-SE

STATE OF INDIANA)
)
COUNTY OF MADISON)

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 25
DAY OF JULY
1983.

/s/ Michael A. Seay

MICHAEL A. SEAY, Notary Public
MY COMMISSION EXPIRES MAY 11, 1985
A RESIDENT OF DELAWARE COUNTY

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
Indianapolis Division

Lavarita De,Shaun. Meriwether	)	
	)	
Petitioner,	)	
	)	
-vs-	)	AFFIDAVIT IN
	)	SUPPORT OR
Norman G. Owens	)	REQUEST TO
Cloid L. Shuler	)	PROCEED IN
Han Chul Choi	)	FORMA
Norman Hunt	)	PAUPERIS
Gordon H. Faulkner	)	
Defendant(s), et al.	)	
_____	)	

I, Lavarita D. Meriwether, D.O.C. No. 24493, being first duly sworn, deposes and says that I am the Plaintiff in the above-entitled cause of action; that in support of my motion to proceed without being required to pre-pay fees, cost, or give security thereof, I state that because of my poverty I am unable to pay the cost of said proceedings or to give security herein, and that I believe that I am entitled to redress. I further swear that the responses which I have made to questions and instructions below are true:

1.) Are you presently employed? Yes

a.) if the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer:

$10.00 Monthly
Indiana Reformatory, Pendleton, Indiana 46064

b.) If the answer is "no," state the date of last employment

and the amount of the salary or wages per month which you received:
N/A

2.) Have you received within the last twelve months any money from any of the following sources?

a.) Business, profession or form of self-employment?
NO

b.) Rent payments, interest or dividends?
NO

c.) Pensions, annuities or life insurance payments?
NO

d.) Gifts or inheritances?
YES

e.) Any other sources?
NO

If the answer of any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months:

received $50.00 for personal need's [*sic.*] from My Father

3.) Do you own any cash, or do you have money in a checking or savings account? (Include any funds in prison account):
YES

If the answer is "yes," state the total value of the items owned:
to date $12.00 Inmate Account

4.) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (Excluding ordinary household furnishings and clothing):
NO

If the answer is "yes," describe the property and state its value:
N/A

5.) List the persons who are dependent upon you for support (state your relationship to those persons, and indicate how much you contribute toward their support):
N/A

I understate that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Respectfully,

/s/ Lavarita Meriwether
PETITIONER, PRO-SE

STATE OF INDIANA)
)
COUNTY OF MADISON)

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 25
DAY OF JULY
1983.

/s/ Michael A. Seay

MICHAEL A. SEAY, Notary Public
MY COMMISSION EXPIRES MAY 11, 1985
A RESIDENT OF DELAWARE COUNTY

WARDEN'S CERTIFICATE
OF INMATES TRUST ACCOUNT

The undersigned Warden, or his duly authorized representative, at the Indiana State Reformatory, Pendleton, Indiana, hereby certifies that the Petitioner, Lavarita Meriweather, has, as of this date, a trust fund balance of $10.50.

Dated this 25th day of August, 1983.

/s/Loren Corner, Counselor
(Signature and Title of Official)

IN THE
UNITED STATES DISTRICT COURT

Lavarita De,Shaun. Meriwether	)	
	)	
Plaintiff(s),	)	
	)	
-vs-	)	COMPLAINT NO.
	)	_____
Norman G. Owens	)	
Cloid L. Shuler	)	
Han Chul Choi	)	
Norman Hunt	)	
Gordon H. Faulkner	)	
Defendant(s), et al.	)	
_____	)	

NOTICE OF TRIAL BY JURY

COMES NOW, Plaintiff Lavarita D. Meriwether, Pro-se, pursuant to Rule 38, Federal Rules of Civil Procedure, and as of right demands trial by jury of all issues presented as alleged in his complaint for civil rights violations of those rights, privileges and immunities guaranteed by the United States Constitution.

Respectfully submitted,

/s/ Lavarita D. Meriwether

PLAINTIFF(S), PRO-SE

CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of August, 1983, a copy of the foregoing "Notice of Trial by Jury" was served upon the defendants in the above entitled cause attached to the foregoing complaint for service in accordance to those applicable rules of process, by mailing same to the Clerk of the United States District Court, Southern, Federal Building, Indianapolis, Indiana 46204, United States Mail with sufficient first-class postage affixed thereto.

Respectfully,

/s/ Lavarita Meriwether
(Name)

24493
(D.O.C. No.)

_____
(Name)

_____
(D.O.C. No.)

Post Office Box 30
Pendleton, In. 46064

PLAINTIFF(S), PRO-SE

ORIGINAL

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

No. 87-370

October Term 1987

GORDON H. FAULKNER, CLOID SHULER, NORMAN HUNT, NORMAN G. OWENS, HAN CHUL CHOI, M.D.,

Petitioners,

v.

LAVARITA D. MERIWETHER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Jerold S. Solovy
William D. Heinz
David E. Zerhusen
J. Cunyon Gordon
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Gary P. Price
LEWIS KAPPES FULLER & EADES
1210 One American Square
Indianapolis, Indiana 46282-0003
(317) 639-1210

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly decided that an inmate who presents a serious medical need is entitled constitutionally to medical treatment from corrections authorities.

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Petitioners,

v.

LAVARITA D. MERIWETHER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Pet. App. A1-A17) is reported at 821 F.2d 408. The decision of the United States District Court for the Southern District of Indiana (Pet. App. A18-A30) is unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit issued on June 4, 1987. The petition for a writ of certiorari was timely filed on August 31, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Respondent, an inmate in the custody of the Indiana Department of Corrections, brought this action under 42 U.S.C. §1983 complaining of the denial of medical care and the conditions of her confinement.[1/] The district court granted the defendants' motion to dismiss the complaint for failure to state a claim. Respondent appealed to the United States Court of Appeals for the Seventh Circuit which reversed and remanded.

Respondent, a transsexual, suffers from "gender dysphoria," a medically recognized psychiatric disorder characterized primarily by a persistent wish to be rid of one's genitals and live as the other sex. Respondent has been chemically castrated due to nine years of medically supervised estrogen therapy, and has undergone surgical modification of her facial structure, breasts, and hips to enhance a female appearance. (Pet. App. A2-3). Respondent

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1/ Respondent considers herself a female, and will be referred to herein in the feminine gender, as she was in the opinion of the Seventh Circuit. See Pet. App. A1, n.1

wears makeup, female attire, and has feminine mannerisms, and in fact has lived as a female since the age of fourteen, i.e. for nearly fifteen years. (Pet. App. A2-3).

Since her incarceration, Respondent has been provided no medical treatment for the physical or psychiatric aspects of her medical condition. (Pet. App. A3). Petitioner Dr. Choi has made humiliating jokes about Respondent's requests for medication and has indicated that he would ensure that she never received medication. (Pet. App. A3, A48). As a result of Petitioners' failure to continue Respondent's therapy, Respondent has suffered severe withdrawal symptoms. (Pet. App. A3). Petitioners have also failed to provide medical treatment to Respondent for complications arising from her silicone implants. Id.

In addition, Respondent has been segregated in protective custody for periods of up to five and one-half months, where she has been the victim of attempted and completed acts of violence and sexual assault, as she was while maintained in the general inmate population. (Pet. App. A3-4). Respondent has been forced repeatedly to disrobe to reveal her naked body to officers and other inmates for no apparent security or penological purpose. (Pet. App. A4, A48-49).

The Seventh Circuit reversed as to the dismissal of the claim of denial of all medical treatment. The Seventh Circuit concluded that Respondent had stated a valid claim under the Eighth Amendment, which, if proven, would

entitle her to some kind of medical treatment. (Pet. App. A8). The Court of Appeals also remanded Meriwether's "conditions of confinement" claims for consideration by the District Court in the first instance. (Pet. App. A10-17).

ARGUMENT

A. The Seventh Circuit's Decision that Respondent is Constitutionally Entitled to Medical Care Correctly Applies this Court's Precedents and is not in Conflict with the Decision of any Other Circuit.

In remanding the case to the district court, the Seventh Circuit avoided deciding what particular course of medical treatment Respondent, or any other transsexual inmate, is entitled to receive. The court merely decided that Meriwether's allegations, taken as true, state a claim of an unconstitutional denial of medical treatment for a serious medical condition within the definition of this Court's holding in Estelle v. Gamble, 429 U.S. 97 (1976). Because its decision correctly applies this Court's precedents and is not in conflict with any other circuit review by this Court is not warranted.

Petitioners concede that the Seventh Circuit applied the correct Conley v. Gibson, 355 U.S. 41, 45-46 (1957) standard to its review of the lower court's dismissal. (Pet. 5). Respondent's allegations, taken as true, as they must be for the purposes of such a motion, Cooper v. Pate, 378 U.S. 546 (1964), support a grant of relief under Estelle, supra.

Estelle established the now well-recognized standard: "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment." This Court held that the Eighth Amendment was violated whether the indifference was manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care. 429 U.S. at 104. To avoid creating a constitutional violation out of simple malpractice, this Court made clear that the "deliberate indifference" standard was not met by inadvertent failure to provide adequate medical care, or by merely negligent diagnosis or treatment of a medical condition. Id. at 105-6.

The Seventh Circuit's application of the Estelle standard is entirely consistent with that of the Tenth and other circuits. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied 450 U.S. 1041 (1981) (following West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978)), construes the Estelle standard as creating a two-pronged test. First, the inmate must establish a serious medical need; second, the inmate must present facts amounting to deliberate indifference. A "serious medical need" requires that an inmate's condition, whether physical or psychiatric, "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." 639 F.2d 559, 574-5.

The "deliberate indifference" is established where the prison prevents an inmate from receiving the recommended medical treatment or where an inmate is denied access to adequate evaluation for his or her medical needs. Ramos v. Lamm, 639 F.2d at 575.

The decision below tracks the Ramos v. Lamm two-prong approach. The Seventh Circuit concluded that under the first prong of the Estelle test a serious and medically recognized psychiatric disorder such as gender dysphoria may present a "serious medical need". In so doing, it relied on highly regarded medical literature as well as on other courts' recognition of transsexualism as a "very complex medical and psychological problem." (Pet. App. A6-7). The court also noted that Respondent's complaint specified the physicians who had been treating her for the condition of gender dysphoria, before her incarceration. (Pet. App. A8 citing [Pet. App. A47]).

Having identified the serious medical need, the Seventh Circuit then found sufficient allegations of deliberate indifference to that need. Petitioners' failure to provide any treatment at all for the physical or psychiatric manifestations of Respondent's illness clearly meets the second prong of the Estelle test. (Pet. App. A8-9). Respondent's allegations as to the ridicule by Dr. Choi manifest much more than indifference, especially in light of the complete medical substantiation of her pre-existing illness and a prior course of treatment. Petitioners'

response, which was, at best, to ignore the need, and, at worst, to exploit it, does not fall into Estelle's protected areas of inadvertent or negligent failure to provide adequate care.

B. The Petitioner Erroneously Characterizes the Seventh Circuit Decision as Requiring Estrogen Therapy When It Expressly Holds Otherwise.

Petitioners erroneously assert that Meriwether's allegations "establish only a claim that Meriwether is being denied estrogen treatment" and that the "Seventh Circuit's decision that this is sufficient to state a claim" contradicts the decision of Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986). (Pet. 4-5). On the contrary, the Seventh Circuit does not state that Meriwether is entitled to estrogen, or any particular course of treatment. The court explicitly held otherwise:

> We therefore conclude that plaintiff states a valid claim under the Eighth Amendment which, if proven, would entitle her to some kind of medical treatment. It is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy. . . . (Pet. App. A8) (emphasis added).

After discussing Supre, the court repeated, "While we can and will not prescribe any overall plan of treatment, the plaintiff has stated a claim under the Eighth Amendment entitling her to some kind of medical care." (Pet. App. A9).

Petitioners persist in misreading the decision when they state that it conflicts with Supre. The Seventh Circuit specifically discussed Supre and believed the decisions to be in accord. See Pet. App. A9.

In Supre, the Corrections Department evaluated the transsexual plaintiff's medical claim and, in the exercise of medical judgment, decided against estrogen therapy. Instead, the medical staff recommended testosterone therapy accompanied by mental health therapy. 792 F.2d at 960.[2/] Thus, the Tenth Circuit viewed the facts as falling within the area that Estelle specifically foreclosed from Eighth Amendment relief: the exercise of professional judgment by prison doctors in opting for one particular course of medical treatment over another, as opposed to "a total failure to give medical attention." Supre, 792 F.2d at 963. Explicit is the Tenth Circuit's recognition that a total failure of medical attention, as is present in the instant case, would state a claim for relief under Estelle.

Nor does Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986) conflict with the Seventh Circuit's holding as urged by Petitioners. There, the court on a motion for

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2/ Supre was "deemed closed" on the merits without judicial resolution because the plaintiff was released from custody. The central issue was whether she had "prevailed" within the meaning of 42 U.S.C. §1988 so as to be entitled to attorneys' fees. The court's examination of the substance of the underlying cause of action was simply a predicate to its resolution of the attorneys' fees question.

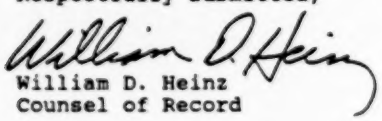
summary judgment faced the question whether the "defendants would be required to provide [a transsexual] plaintiff with the requested pre-operative hormone treatment and surgery." Lamb v. Maschner, supra at 353. As in Supre, the defendants were providing medical treatment, although not the plaintiff's desired form. The court interpreted Estelle to bar a finding of an Eighth Amendment violation. 633 F. Supp. at 353. Nothing in either Supre or Lamb even remotely suggests that Meriwether -- where the inmate alleges a total denial of medical treatment -- was wrongly decided.

Conclusion

Only Petitioners' misreading of the Seventh Circuit's decision leads them to find it in conflict with the Tenth Circuit's Supre decision and with Lamb. These decisions are in accord, and reflect faithful application of Estelle to allegations of deliberate indifference to inmates' serious medical needs.

The petition for a writ of certiorari should be denied.

Respectfully submitted,



William D. Heinz
Counsel of Record

Jerold S. Solovy
David E. Zerhusen
J. Cunyon Gordon
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Gary P. Price
LEWIS KAPPES FULLER & EADES
1210 One American Square
Indianapolis, Indiana 46282-0003
(317) 639-1210